Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
CHIBARDUN TELEPHONE COOPERATIVE, INC.	)	
CTC TELCOM, INC.	)	
	)	
Petition for Preemption Pursuant to	)	CC Docket No. 97-219
Section 253 of the Communications Act	)	
of Discriminatory Ordinances, Fees	)	
and Rights-of-Way Practices of the	)	
City of Rice Lake, Wisconsin	)	

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI Telecommunications Corporation ("MCI") respectfully submits these comments in support of the petition filed by Chibardun Telephone Cooperative, Inc. ("Chibardun") requesting that the Commission preempt the City of Rice Lake, Wisconsin ("Rice Lake" or "the "City") pursuant to Section 253(d) of the Telecommunications Act of 1996 ("the federal Act" or the "1996 Act") from imposing anticompetitive and discriminatory right-of-way requirements and fees solely on new entrants. MCI believes that Rice Lake should be barred from imposing an impermissible third tier of regulations and discriminatory rights-of-way requirements on new entrants.

I. THE CITY OF RICE LAKE'S LICENSE AGREEMENT AND INTERIM ORDINANCE NO. 849 WARRANT PREEMPTION BECAUSE THEY ERECT BARRIERS TO ENTRY AND IMPOSE CONDITIONS AND REQUIREMENTS ON NEW ENTRANTS IN A DISCRIMINATORY AND NON-COMPETITIVELY NEUTRAL MANNER

In order to implement the national policy framework of the Act, Congress barred state and local governments from promulgating regulations or requirements that would frustrate the

accomplishment of Congress' goals to encourage telecommunications competition. Consequently, section 253(a) proscribes state or local statutes, regulations, or other legal requirements that would "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services."

In direct contravention of section 253(a), however, the City's License Agreement and Interim Ordinance would serve as significant barriers to entry. As preconditions for grant of excavation permits to build telecommunications facilities, the License Agreement and Interim Ordinance are discriminatory and overburdensome for new entrants.[1] The provisions challenged by Chibardun would impose requirements, not to mention the cumulative effect of these many requirements on any one carrier, that may fairly be construed as effectively barring from entry some service providers. In addition to the License Agreement and Ordinance provisions, Chibardun also describes conduct engaged in by the City that has the effect of preventing Chibardun from offering telecommunications services in competition with the local incumbent monopolist, GTE North ("GTE").[2]

A. Application of the License Agreement and "Interim" Ordinance No. 849 to New Entrants Only is Not Competitively Neutral.

The City's License Agreement is anticompetitive and discriminatory because it imposes far more onerous and expensive obligations upon new entrants than the existing Rice Lake Code imposes upon either GTE or Marcus. While section 253© of the Act preserves state and local authority to manage the public rights-of-way and require fair and reasonable compensation, it

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[1] 47 U.S.C. § 253(a).

[2] MCI's comments address the City's actions as they pertain only to the provision of telecommunications service, not cable service.

must be done "on a competitively neutral basis."[3] No local exchange carrier, especially the incumbent, can be accorded preferential treatment in its use of the public rights-of-way or payment for such use.

Particularly disconcerting to MCI is clause 14 of the License Agreement, which requires Chibardun and other new entrants to (1) pay the City an "administrative fee" of $10,000 for the "drafting and processing" of the License Agreement and (2) agree to reimburse the City for "any and all" costs the City incurs for review, inspection or supervision of the newcomers activities under the Agreement or under "any other ordinances" for which a permit fee is not established.[4] The $10,000 processing fee is unreasonable, excessive, and not competitively neutral. Its enormity will deter new entrants from even contemplating operating competitive telecommunications facilities in Rice Lake.

The remainder of clause 14 is written in such open-ended language that it potentially subjects new entrants to vast unknown and unquantifiable fees. Rather than determine the costs to the City of administering public rights-of-way, the City would impose an as yet undisclosed fee. Not only does section 253© require local compensation requirements to be fair and reasonable, but they must be "publicly disclosed."[5] The City's failure to justify the large processing fee and "publicly disclose" what it means by "any and all" costs violates Section

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[3] 47 U.S.C. § 253(a). See also, Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, CS Docket No.96-46, FCC 96-249 at ¶ 209 (rel. June 3, 1996) (where the FCC concluded that State and local authorities may impose conditions on the use of the rights-of-way "so long as such conditions are applied equally to all users of the rights-of-way (*i.e.*, are non-discriminatory and competitively neutral)").

[4] Chibardun Petition at 22; Exhibit D (draft License Agreement).

[5] 47 U.S.C. § 253(c).

253(c). Assuming, arguendo, that the $10,000 fee is even related to the City's costs in connection with "management" of public rights-of-way, clause 14 fails to satisfy any of 253(c)'s other requirements.

Another fatal flaw of the City's compensation scheme is that is not imposed on a "competitively neutral and non-discriminatory basis." Because new entrants are the only entities required to sign the License Agreement, only new entrants are required to pay the processing fee and agree to reimburse the City in the first instance. The Commission recently stated that the "[o]ne clear message from Section 253 is that when a local government chooses to exercise its authority to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, it must do so on a competitively neutral and nondiscriminatory basis. Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory."[6] The application of the License Agreement as a whole, and Clause 14 in particular, solely to new entrants is violative of the Act.[7]

Similarly, Rice Lake's Interim Ordinance discriminates between incumbents and new entrants in the granting of excavation permits. Section 3 of the Interim Ordinance exempts repair

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[6] *See* TCI Cablevision of Oakland County, Inc., FCC 97-331, at ¶ 108 (rel. Sept. 19, 1997) (TCI).

[7] There are other unreasonable preconditions for an excavation permit set forth in the City's License Agreement which apply exclusively to the operations of new entrants, such as the City's requirement that it receive free, unlimited use of Chibardun's poles, conduits and other structures. The City also would require prospective new entrants to give up the right to appeal or seek preemption of any anticompetitive and discriminatory provisions in the future ordinance. No entity would agree to such a provision. MCI agrees with Chibardun that these provisions warrant preemption due to their discriminatory and non-competitively neutral application.

and maintenance work associated with existing equipment and facilities. To the extent that the Interim, or future, Ordinance does not apply to the incumbent, which is presumably operating with permission from the City, this or any other ordinance would be unlawfully discriminatory under section 253(c). MCI agrees with Chibardun and urges the Commission to preempt the License Agreement and Ordinance No. 849 to the extent they require more of new entrants than of incumbents pursuant to its authority under Section 253(d).[8]

B. Rice Lake Should be Preempted From Including Discriminatory and Non-Competitively Neutral Terms and Conditions in its Proposed Telecommunications Ordinance

Prior to the 1996 Act's passage, Rice Lake apparently did not regulate the activities of the incumbent, GTE. Rather, it maintained an arms length relationship with GTE and imposed on it only traditional rights-of-way regulations that were applicable to all public utilities. As detailed in Chibardun's petition and discussed above, Rice Lake's License Agreement and proposed Telecommunications Ordinance breaks from this history and attempts to impose additional requirements exclusively on new entrants. The Commission has warned that "governments that have historically refrained from engaging in substantive telecommunications regulation should not view new entrants as being more susceptible to regulation than the incumbents."[9]

The License Agreement reveals the City's intent to treat new entrants differently than it

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[8] 47 U.S.C. § 253(d) states, "[i]f, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."

[9] TCI, ¶109, n 2.

currently treats GTE.[10] The Commission should take this opportunity to preempt the potential inclusion of the discriminatory and non-competitively neutral terms and conditions present in the License Agreement and in any future Rice Lake Telecommunications Ordinance.

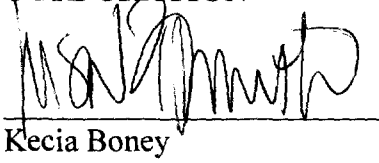
II. CONCLUSION

For the above reasons, MCI supports Chibardun's request that the Commission preempt the City of Rice Lake from: (1) insisting that Chibardun, or any new entrant, sign its proffered License Agreement as a precondition for the City's grant of an excavation permit; (2) enforcing Ordinance No. 849; (3) adopting and enforcing any future right-of-way ordinances placing larger fees and more onerous conditions and restrictions upon new entrants; and (4) otherwise engaging in practices which impose anticompetitive and discriminatory costs, delays and conditions upon Chibardun and any other telecommunications provider seeking to bring telecommunications competition to the residents of Rice Lake.

Respectfully submitted,

December 3, 1997

MCI TELECOMMUNICATIONS CORPORATION



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[10] MCI notes that Rice Lake's apparent failure to timely grant Chibardun the required permits has prohibited it from entering the local market in 1997. The City's continuing delay will likely prevent Chibardun from entering the Rice Lake market in 1998. The Commission has opined that "[u]nexplained administrative failure to provide permit applications with responses within a reasonable time may lead [it] to construe the circumstances most favorable to the party aggrieved by the delay." See TCI, ¶ 76, n 2.

CERTIFICATE OF SERVICE

I, Mellanese Farrington, hereby certify that on this 3rd day of December 1997, I served by first-class United States Mail, postage prepaid, a true copy of the foregoing Comments, upon the following:

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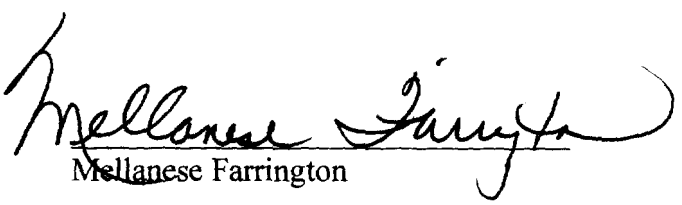

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